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Attorneys for Charging Party
NATIONAL UNION OF HEALTHCARE WORKERS

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

QUEEN OF THE VALLEY MEDICAL CENTER, Respondent, and NATIONAL UNION OF HEALTHCARE WORKERS (NUHW) Charging Party,	Case Nos. 20-CA-191739 20-CA-196271 20-CA-197402 20-CA-197403 **CHARGING PARTY'S RESPONSE TO GENERAL COUNSEL'S CROSS-EXCEPTION TO THE ALJ'S DECISION** Hearing Dates: August 7-11, 23-25, November 1-2, 2017 Administrative Law Judge: Sharon L. Steckler

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Charging Party the National Union of Healthcare Workers (Charging Party) briefly responds to the Counsel for the General Counsel's (General Counsel) Cross-Exception to the Administrative Law Judge's (ALJ) Decision (ALJD), filed with this Board on April 18, 2018.

The General Counsel's notes that the ALJ correctly found that Respondent Queen of the Valley Medical Center (Respondent) recognized, failed and refused to bargain and ultimately withdrew recognition from the Union. The General Counsel's single exception simply argues that the record supported an additional specific finding that, even absent a finding of recognition and withdrawal of recognition, the Respondent's conduct violated section 8(a)(5) of the Act.

In this regard, the General Counsel cites to the following passages:

> General Counsel offers two theories regarding Respondent's conduct here: Respondent refused to bargain; and in the alternative, Respondent withdrew recognition. I find that Respondent failed and refused to bargain with the Union, the bargaining unit's certified representative, when it had an obligation to do so, which the Board has termed a withdrawal of recognition. (ALJD at 40:41-41:2.)
> ...
> Respondent then stopped all discussions and negotiations with the Union. Respondent's continued refusal to recognize and bargain with the Union violates Section 8(a)(5). (ALJD at 49:5-7.)
> ...
> The entire course of conduct demonstrates that Respondent violated Section 8(a)(5) by failing to provide information, making unilateral changes, and withdrawing recognition. (ALJD at 52:15-17.)

Alone and in context, the above passages demonstrate the ALJ's finding that following Respondent's March 16, 2018 letter to the Union, Respondent's subsequent refusal to bargain and withdrawal of recognition violated Section 8(a)(5) of the Act. See ALJD at 48:46-49:5. Since the ALJ found withdrawal, the ALJ did not explicitly rule on the General Counsel's alternate theory that even absent a finding of withdrawal, Respondent nonetheless violated 8(a)(5). However, this separate finding is implicitly, if not nearly explicitly, supported by the above-cited text and other findings in the ALJD. Thus, Charging Party concurs with the General Counsel's single exception, and with the facts and argument cited in its supporting brief: both the record evidence and the ALJ's findings support a separate finding that even absent a finding of recognition and withdrawal of recognition, Respondent's failure to abide by its current obligation to bargain with Charging Party violates Section 8(a)(5) of the Act.

A few days ago, on April 30, 2018, Respondent filed its response to this single exception.

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In its answering brief, Respondent claims that it has been consistently asserting a technical refusal to bargain, writing: "Respondent's continued certification challenge follows the procedures outlined in longstanding Board precedent. *See, e.g., Freds, Inc.*, 343 NLRB 138, 138 (2004); *GKN Sinter Metals, Inc.*, 343 NLRB 315, 315 (2004); *Terrace Gardens Plaza v. NLRB*, 91 F.3d 222, 226 (D.C. Cir. 1996)." Respondent's Answering Brief, at pp. 1-2. ***But Respondent's next sentences defy logic and reflect a complete misunderstanding of the technical refusal to bargain process and law, and admits that Respondent has not properly asserted a technical refusal to bargain.*** Respondent next writes:

> ...Because Respondent has not and does not recognize the Union as the exclusive agent for collective bargaining, it does not have an obligation to recognize and bargain with the Union.
>
> For these reasons, Respondent respectfully requests that the Board deny Counsel for the General Counsel's request for a finding that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union notwithstanding Respondent's engaging in a technical refusal to bargain.

Respondent's Answering Brief, at pp. 2. Once again, Respondent's position makes absolutely no sense. It is inherently inconsistent to assert a technical refusal to bargain, but then to deny violating Section 8(a)(5) of the Act. The entire technical refusal to bargain theory is dependent on a predicate Board finding of Section 8(a)(5). This is clearly explained in the "longstanding Board precedent" cited by Respondent:

> A Board order directing that an election be held, or thereafter certifying the prevailing union as the representative of the employees, is not final agency action subject to judicial review under § 10(f). *Boire v. Greyhound Corp.*, 376 U.S. 473, 476–77, 84 S.Ct. 894, 896–97, 11 L.Ed.2d 849 (1964). **Judicial review is available only if the employer refuses to bargain and is found, in a final order of the Board, to have violated § 8(a)(5).** *See, e.g., American Fed'n of Labor v. NLRB*, 308 U.S. 401, 409, 60 S.Ct. 300, 304, 84 L.Ed. 347 (1940). The employer may then petition the court of appeals for review and argue the invalidity of the union's certification as an affirmative defense to the unfair labor practice charge. *Boire*, 376 U.S. at 477, 84 S.Ct. at 896.

Terrace Gardens Plaza, Inc. v. N.L.R.B. (D.C. Cir. 1996) 91 F.3d 222, 225 (emphasis added). Respondent's own very short answering brief also acknowledges that to test certification, it must first be found to have violated Section 8(a)(5), arguing:

> The next day [on March 1, 2017], the Union's chief Labor negotiated (sic) sent a

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> letter to Respondent formally requesting that it recognize and bargain with the Union…On March 16, 2017, Respondent's Labor and Employment Counsel responded to the letter and refused the Union's request for recognition and to bargain, explaining that it wanted to exercise its right to appeal the Board's decision to the United States Circuit Court of Appeals *through the proper procedural course, i.e., by continuing to engage in a technical refusal to bargain so as to trigger an unfair labor practice charge against it.*

See Respondent's Answering Brief, at pp. 1, fn. 1 (emphasis added). As Respondent admits, if it were asserting a technical refusal to bargain it would "trigger an unfair practice charge against it" and be found to have violated Section 8(a)(5) of the Act. Here, by asking this Board to deny that it has violated Section 8(a)(5) of the Act, Respondent—in its own words—has failed to assert a technical refusal to bargain "through the proper procedural course."

As noted in Charging Party's response to the Respondent's numerous and varied exceptions, we can only speculate on why Respondent did not simply exercise its right to assert a technical refusal to bargain at the time of the Union's December 22, 2016 certification. We also do not know why the Respondent is presently taking the befuddling position that it has not violated Section 8(a)(5) of the Act. Respondent appears to be claiming that it can assert a technical refusal to bargain without having violated 8(a)(5), which is plainly wrong under the "longstanding Board precedent" which Respondent itself cites. Like the employer in *Terrace Gardens*, Respondent's "supposed quandry reflects a fundamental misunderstanding of the statutory scheme." *Terrace Gardens Plaza, Inc. v. N.L.R.B.* (D.C. Cir. 1996) 91 F.3d 222, 225. In any case and regardless of its motivations for so asserting, Respondent's request that this Board deny a Section 8(a)(5) violation is a party admission that it is not asserting a technical refusal to bargain through the proper procedural course. Accordingly, and for other reasons argued in response to Respondent's exceptions, the ALJ's decision should be upheld in its entirety.

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DATED: April 25, 2018

SIEGEL LEWITTER MALKANI

By: _____
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PROOF OF SERVICE

I declare that I am employed in the county of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 1939 Harrison Street, Suite 307, Oakland, California 94612.

On May 2, 2018, I served the within document:

CHARGING PARTY'S RESPONSE TO GENERAL COUNSEL'S CROSS-EXCEPTION TO THE ALJ'S DECISION

on the interested party(ies) herein by sending a true copy as follows:

✖ (BY ELECTRONIC FILING) via the NLRB website to:

Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20520

And:

✖ (BY ELECTRONIC MAIL) All of the pages of the above-described document(s) were sent to the recipients listed above via electronic mail, at the respective email address(es) indicated thereon.

✖ (BY GSO COURIER-NEXT DAY SERVICE) The above-described document(s) were served on the interested parties listed above, by placing a copy in a separate GSO mailer and attaching a completed GSO shipping document and caused said mailer to be deposited in the GSO collection box at Oakland, California

To:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May, 2, 2018, at Oakland, California.

Frances Chen

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